Supreme Court, U.S.
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NO. 96 758 NOV 1 2 1996

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ELEANOR TAYLOR,
Plaintiff-Petitioner
VS.

McLENNAN COMMUNITY COLLEGE,
DR. DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
MR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
(95-50601)

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ELEANOR TAYLOR	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. W-94-CA-288**
MCLENNAN COMMUNITY	§	
COLLEGE,	§	
DENNIS MICHAELIS,	§	
DEBORAH GARRETT,	§	
RICHARD CORONADO, &	§	
MIKE JONES,	§	
Defendants.	§	

ORDER

Came on to be considered the Motions of Defendants McLennan Community College ("MCC"), Dennis Michaelis ("Michaelis"), Deborah Garrett ("Garrett"), Richard Coronado ("Coronado"), and Mike Jones ("Jones"), for Summary Judgment, and Plaintiff Eleanor Taylor's ("Taylor") responses. After careful consideration, the Court determines that Defendants' Motions are meritorious and are therefore granted.

I. Background

On February 11, 1993, Plaintiff received a letter from Defendant Michaelis terminating her employment with MCC effective March 31, 1993 and placing her on administrative leave with pay until that date. The stated reason for her termination was insubordination and inability to follow administrative procedures and directives of her superiors.

Taylor disagreed with the stated reasons for her termination. She felt that her termination was due to the exercise of her First Amendment rights, because of her race, her sex, and the fact that she filed a worker's compensation claim. Plaintiff has brought suit against the Defendants pursuant to 42 U.S.C. §§ 1981, 1983, 1985, Title VII and for the Texas based claims of intentional infliction of mental anguish and section 451.001 of the Texas Labor Code.

II. Discussion

A. Summary Judgment

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED.R.Civ.P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met its burden, the court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. See id. at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. See id. at 1031; Jones v. Western Geophysical Co., 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to graant summary judgment the court is merely dtermining whether a factual dispute exists and is not required to resolve those disputes. See Jones, 669 F.2d at 283. The fact that it appears to the Court that the non-moving party is unlikely to prevail at trail or that the movant's statement of facts appears more

plausible is not a reason to grant summary judgment. See id. at 283.

However, if the movant satisfies his initial responsibility, based on "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, " of an absence of a genuine issue of material fact, and they are entitled to judgment as matter of law, the non-movant must present sufficient summary judgment proof indicating that a material fact is in dispute or that the movant is not entitled to judgment as matter of law. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552 (1986). By imposing this requirement on the non-movant, Rule 56 isolates and disposes of factually unsupported claims and defenses. Id. at 2553. It is not a disfavored procedural shortcut, but rather "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex, 106 S.Ct. at 2555; FED.R.CIV.P. 1. Thus, summary judgment should be granted when "critical evidence is so weak or tenuous or aan essential fact that it could not support a judgment in favor of the non-movant, or where it is so overwhelming that it mandates judgment in favor of the movant." Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

In order to successfully oppose a motion for summary judgment, the non-movant must "designate specific facts showing that there is a genuine issue for trial." Nissho-Iwai American Corp. V. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988); See also, Savers Federal Sav. & Loan Ass'n v. Reetz, 888 F.2d 1497, 1501 (5th Cir. 1989); Franz Chemical Corp. v. Philadelphia Quartz, 594 F.2d 146, 150 (5th Cir. 1979); De Bardeleben v. Cummings, 453 F.2d 320, 324 (5th Cir. 1972). A non-movant does not meet his burden by merely referring to his attached deposition. Id. at 1307. The Court is under no obligation or duty to search the entire record to determine

whether a genuine issue of material fact exists. Id. Additionally, when the non-movant relies on affidavits, "it cannot rely on conclusory allegations unsupported by factual detail to create an issue of material fact." Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). Thus, as the Fifth Circuit emphasized in Topalian v. Ehrman, 954 F.2d 1125, 1137 (5th Cir.), cert. denied, 113 S.Ct. 82 (1992), "[t]he burden to discover a genuine issue of material fact is not on the [the] Court." (emphasis added).

B. Title VII: Individual Liability

Title VII provides a remedy to individuals who have been discriminated against on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000(e). However, Title VII only prohibits discrimination by "employers." 42 U.S.C. § 2000e-2. An "employer" includes any "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks . . . " Id. § 2000e-2. Individual employees of a corporation are not personally liable under Title VII. Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1129 (10th Cir. 1993). Furthermore, a Title VII suit asserted against an individual supervisor is, in reality, a suit against him in his official capacity. Sauers, 1 F.3d at 1125. Official capacity suits are suits against the entity. See generally, Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985).

Plaintiff's Title VII claims against Defendants Michaelis, Garrett, Coronado, and Jones in their individual capacity are dismissed. Title VII does not authorize suits against individual employees. In fact, Plaintiff recognizes as much,

> [p]laintiff agrees that, under existing case

> law, Plaintiff's Title VII claims cannot and should not be asserted against Defendants Dr. Dennis Michaelis, Dr. Deb Garrett, Mr. Richard Coronado, or Mr. Mike Jones in their individual capacities. Plaintiff further agrees that liability for Plaintiff's Title VII claims in this case should be limited to the College since the College, as Plaintiff's employer, is ultimately responsible for the acts of its agents under Title VII.

Plaintiff's Response to the Motion for Summary Judgment and Brief of Defendants Dennis Michaelis, Deborah Garrett, Richard Coronado and Mike Jones ("Plaintiff's Response"). Accordingly, Plaintiff's Title VII claims against Defendants Michaelis, Garrett, Coronado and Jones are dismissed.

C. Statue of Limitations

When a federal statute does not include a statute of limitations, federal courts apply the most appropriate limitations period provided by state law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Dumas v. Mt. Vernon, 612 F.2d 974, 977 (5th Cir. 1980). Claims brought pursuant to § 1983 are characterized as personal injury claims, Frazier v. Garrison I.S.D., 980 F.2d 1514, 1521 (5th Cir. 1993), as are claims based on §§ 1981 and 1985. National Ass'n of Governmental Employees v. City of Public Service Bd. of San Antonio, 40 F.3d 698, 713 n.22 (5th Cir. 1994); McDougal v. County of Imperial, 942 F. 2d 668, 673-74 (9th Cir. 1991); therefore, Texas' two year statute of limitations applies to Plaintiff's claims. Frazier, 980 F.2d at 1521.[1]

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[1]Defendants do not appear to have raised statute of limitations as a defense to Plaintiff's Title VII claims; therefore, the Court declines to address the issue sua sponte.

However, in United Air Lines, Inc. v. Evans, the United States Supreme Court indicated that discriminatory acts that could not be used to establish a cause of action might still be admissible.

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. 553, 558 (1977). Thus, evidence of past discriminatory acts, which are not sufficient to establish an independent cause of action may provide relevant background information in determining whether a present descriminatory action occurred. Bouman v. Block, 940 F.2d 1211, 1218 (9th Cir. 1991); Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396, 402 (1st Cir. 1990).

In Cortes v. Maxus Exploration Co., 977 F.2d 195, 199 (5th Cir. 1992), the court held that evidence of time barred acts under Title VIII was admissible to show current discriminatory practice. In that case, the district court found the plaintiff had been sexually harassed and constructively discharged in March, 1986. However, the district court considered numerous instances of sexually harassing behavior that occurred between the years 1980-82. The Fifth Circuit held that ". . . the district court properly considered evidence of the 1980-82 fear producing actions in determining whether the 1986 actions amounted to sexual harassment and constructive discharge." Id. at 199. The circuit court then

cited numerous cases in which it had held that such evidence was admissible - Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir.), reh'g denied, 656 F.2d 704 (5th Cir. 19810("[w]hile some or most of this evidence may concern time-barred conduct, it is relevant, . . . and may be used. . . to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives."); Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 540 (5th Cir.), reh'g denied, 618 F.2d 1389 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981) (time-barred acts admissible to prove current conduct); Crawford v. Western Elec. Co., 614 F.2d 1300, 1314 (5th Cir.), reh'g denied, 620 F.2d 300 (5th Cir. 1980)(time barred conduct relevant to show current discriminatory practices).

Taylor filed her lawsuit on October 13, 1994. Plaintiff claims that she was terminated on March 31, 1993. Therefore, her claim for damages resulting from her termination is not time-barred.

Plaintiff also alleges that additional discriminatory actions occurred from 1987 through August, 1992. While these actions would not support an independent cause of action, both the Fifth Circuit and the United States Supreme Court have indicated that such evidence is admissible as "background evidence in a proceeding in which the status of a current practice is at issue". Because this appears to be how Plaintiff intends to use this past evidence, the Court denies Defendants' Motion for Summary Judgment based on the Statute of Limitations.

D. Conspiracy - 42 U.S.C. § 1985

Taylor asserts that the Defendants conspired to deprive her of her civil rights in violation of 42 U.S.C. § 1985. Liability under this statute may arise

> [i]f two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In order to establish a violation of § 1985, the plaintiff must allege and prove:

(1) a conspiracy;

(2) formed for the purpose of depriving another of equal privileges or immunities;

(3) an act in furtherance of the conspiracy committed or caused to be committed by a conspirator; and

(4) that she was injured in her person or property or deprived of a right or privilege as a United States Citizen.

Jones v. Adam's Mark Hotel, 840 F.Supp. 66, 68 (S.D.Tex. 1993)(citing Griffen v. Brechenridge, 403 U.S. 88, 102-03 (1971).

In order to satisfy the "conspiracy" requirement of § 1985, the plaintiff must show that the conspiracy involved two or more persons. Hillard v. Furguson, 30 F.3d 649, 653 (5th Cir. 1994). In the Fifth Circuit, it has long been the rule that "a corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." Id. at 653; Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert denied, 345 U.S. 925 (1953). Furthermore, actions taken by employees, for purposes of § 1985, are considered to have been taken by the same collective entity. Id. at 68; Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505 (6th Cir.), cert. denied, 501 U.S. 1261, 111 S.Ct. 2917, 115 L.Ed.2d 1080 (1991). Thus, in Moody v. Jefferson Parish School Bd., 803 F.Supp. 1158, 1166 (E.D.La. 1992), aff'd, 2 F.3d 604 (1993), the district court dismissed the plaintiff's § 1985 claim against the Personnel Evaluation Coordinator for the Jefferson Parish School Board, the Principal of West Jefferson High School, the Vice-Principal of the school and various teachers who allegedly conspired to deprive the plaintiff of her constitutional rights. Plaintiff had brought suit against the Defendants in both their individual and official capacities. Id. at 1160. However, the Court dismissed the plaintiff's § 1985 claim because the individual defendants and the school board could not conspire with themselves. Id. at 1167. See also, Hull, 926 F.2d at 509-10(affirming summary judgment for defendants, who were sued in both their individual and official capacities because they were members of the same collective entity); Allen v. City of Chicago, 828 F.Supp. 543, 565 (N.D.Ill. 1993)(dismissing Plaintiff's § 1985 claim against defendants sued in both their individual and official capacities).

Defendants maintains that Taylor's conspiracy claim must fail. Plaintiff apparently agrees with the Defendants' interpretation of the law. Plaintiff states

> Taylor acknowledges that MCC accurately states the law in this Circuit relating to conspiracy. . .and that the application of the law in this Circuit would prevent Taylor from pursuing a claim for conspiracy under 42 U.S.C. § 1985 for the reason that all Defendants are considered to be a single entity or "person" under the law.

Plaintiff's Response to Defendant McLennan Community College's Motion for Summary Judgment at p. 5-6. Consequently, Plaintiff's conspiracy claim is dismissed.

E. Due Process

The Due Process Clause of the Fourteenth Amendment requires notice and an opportunity to be heard before the termination of a public employee if such termination would infringe a liberty or property interest. Johnson v. Southwest Mississippi Regional Medical Center, 878 F.2d 856, 858 (5th Cir. 1989). When determining whether an employee has a liberty or property interest in continued employment, the district court must look to state law. Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed. 684 (1976). A claim of entitlement to continued employment "may be directly created by state statute or by a written contract, or by a mutually explicit understanding enforceable under state law as an implied contract." Johnson, 878 F.2d at 858.

1. Property Interest

In Texas, employees are at-will employees and may be terminated without cause. Glagola v. North Texas Mun. Water Dist., 705 F.Supp. 1220, 1221 (E.D.Tex. 1989). However, a written contract creates a legitimate claim of entitlement to an employment position. Perry v. Sindermann,

408 U.S. 593, 601-02 (1972). A college professor or staff employee dismissed during the term of his employment contract has an interest in continued employment that is safeguarded by due process. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

In her response, Plaintiff maintains that her contract with MCC creates a property interest. Plaintiff's employment contract provides the following:

> This Contract, made and entered into by and between the Board of Trustees of McLennan County Junior College District, in connection with its operation of the McLennan Community College, ("MCC") and Eleanor Taylor, ("Employee"), Witness: The MCC hereby employs the said Employee, as Coordinator of Upward Bound Program of the McLennan Community College for a period of 12 months, beginning September 1, 1992, and ending August 31, 1993, at a salary of $39,734 . . ."

Exhibit 29 Employment Contract between MCC and Taylor. Further, the contract goes on to state that the

> [e]mployee acknowledges and agrees that this contract creates no property interest of any kind beyond the period of time stated in the contract and that there is no expectation of employment, expressed or implied, beyond the expiration date of this contract.

Id. (emphasis added).

Defendants state that Plaintiff was terminated in March, 1993. Plaintiff's termination occurred before her

employment contract had expired; therefore, Plaintiff had a property interest in her employment when she was terminated.[2] However, the above language clearly indicates that Plaintiff does not have a "continued" right to employment after the expiration of her employment contract. The contract ended on August 31, 1993, and Plaintiff acknowledged that "the contract creates no property interest of any kind beyond the period of time stated in the contract," which is August 31, 1993. Therefore, Plaintiff does not have a property interest in her employment after this date.

2. Liberty Interest

In order to establish a deprivation of a liberty interest, a terminated employee must show that she was terminated, without notice and an opportunity to be heard, for a reason which was 1) false, 2) stigmatizing, and 3) published. Moore v. Mississippi Valley State University, 871 F.2d 545, 549 (5th Cir. 1989); Huffstutler v. Bergland, 607 F.2d 1090, 1092 (5th Cir. 1979), or that she was denied other employment opportunities by the state as a result of a stigmatizing termination, for which she did not receive proper notice and a name clearing hearing. Id. at 549; Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972).

Reputational injury alone does not implicate a constitutionally protected liberty interest. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 1161 (1976). Instead, the plaintiff must show that the employer's charges "rise to such a level

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[2]An issue not addressed by either party is whether Plaintiff fails to allege a due process claim because she received all the benefits under her employment contract until it expired on August 31, 1993. See Kinsey v. Salado Independent School Dist., 950 F.2d 988, 997 (5th Cir. 1992); Cannon v. Beckville Indep. School Dist., 709 F.2d 9, 11 (5th Cir. 1983).

that they create a 'badge of infamy' which destroys the plaintiff's ability to take advantage of other employment opportunities." Evans v. Dallas, 861 F.2d 846, 851 (5th Cir. 1988). In addition, the false and stigmatizing charges must have been made public; therefore, publication does not occur when the information is known only in the workplace, i.e. is communicated only between employer and employee. Moore, 871 F.2d at 549; Cogdill v. Comal Indep. School Dist., 630 F. Supp. 47, 50 (W.D. Tex. 1985)(holding that disclosure of charges by school administrator to the school board does not constitute publication).

Plaintiff's allegations are not of such a nature that they rise to the level of creating a "badge of infamy" destroying her ability to obtain other employment. In addition, there is no evidence that any of the Defendants accused Taylor of immoral or stigmatizing conduct. Taylor provides no evidence that she was accused of immorality, dishonesty, or that her ability to seek employment was actually impaired. Instead, the only accusation Defendants apparently made against Plaintiff was that she failed to follow the College's rules and procedures, which could hardly be characterized as stigmatizing. Further, Plaintiff fails to provide any evidence that any information was communicated to individuals other than her employer. Thus, Plaintiff fails to establish the "publication" requirement needed to create a "liberty" interest.

3. Procedural Due Process

A public employee with a property interest in his current and/or continued employment has a right to procedural due process prior to and subsequent to termination. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). First, a public employee is entitled to a pre-termination hearing prior to termination. Simien v. San Antonio, 809 F.2d 255, 258 (5th Cir. 1987). The pre-

termination hearing does not have to resolve the "propriety of the discharge." Helms v. Rafter, 853 F.Supp. 897, 903 (W.D.N.C. 1994) citing Cleveland, 470 U.S. at 532. Constitutionally sufficient due process is provided when the employee receives, "'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'" Id. at 903; quoting Cleveland, 470 U.S. at 546. However, the employer is not required to provide the employee with documentary evidence supporting the employee's dismissal. The employer need only provide the dismissed employee with a sufficient descriptive explanation which enables the employee to make an intelligent response. Linton v. Frederick County Bd. of County Comm'rs, 964 F.2d 1436, 1440 (4th Cir. 1992); see also, Gniotek v. Philadelphia, 808 F.2d 241, 244 (3rd Cir. 1986), cert denied, 481 U.S. 1050 (1987); Helms, 853 F.Supp. at 903. However, when a state actor provides an administrative procedure satisfying due process requirements, and the plaintiff fails to avail himself of the procedural protections, the state cannot be held to have violated a public employee's procedural due process. Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir.), cert. denied, 459 U.S. 1017 (1982). The following cases involve procedural due process in the termination of public employees.

In Russell v. Harrison, 632 F.Supp. 1436 (N.D.Miss. 1986), aff'd without opinion, 815 F.2d 698 (1987), the Court denied plaintiffs' claims of procedural due process. On November 18, 1982, the plaintiffs received letters stating that their positions were being terminated as of December 31, 1982, because of a fiscal emergency at the University. The letter further stated that if further clarification of the matter was necessary, or assistance was needed in finding other employment, the plaintiffs should contact the President's Office. Neither plaintiff contacted the Office of the President, the faculty personnel committee, or any other forum. Id. at

1440. The district court held that while public employees with a property interest in their continued employment have a right to notice and a hearing prior to their termination, it is incumbent on the employee to request such a hearing. Id. at 1441 citing Perry, 408 U.S. at 603. When then employee is provided an opportunity for a hearing before the termination is effective, procedural due process is satisfied. Russell, 632 F.Supp. at 1441. Since the plaintiffs in this case were informed on November 18, 1982 that their termination was to become effective on December 31, 1992, they clearly had adequate time to request a hearing before the termination was effective. Id. at 1442. Their failure to request a hearing forestalls any later complaints of a denial of procedural due process. Id. at 1442.

In Faucher v. Rodziewicz, 891 F.2d 864, 867 (11th Cir. 1990), the court held that the plaintiff, an anesthestioligist, was not denied procedural due process when her services were significantly limited by the hospital. The court held that, even if the plaintiff had a protected property right, she failed to utilize the extensive internal hospital appeal procedures to contest the impairment of her anesthesiology services, and the failure to do so doomed her claim. Id. at 870.

In a case somewhat similar to the present, Correa v. Nampa School Dist., 645 F.2d 814 (9th Cir. 1981), the Ninth Circuit denied plaintiff's procedural due process claim. In that case, the plaintiff, a supervisor, filed suit against the local school district after her school contract was not renewed. The school placed her on probation in March, 1977 after she received a written evaluation of her performance. The plaintiff was subsequently informed on May 13, 1977 that her employment contract would not be renewed. The school district failed to provide any reasons for the contract's non-renewal. The court denied the plaintiff's procedural due process claim, holding that "a person cannot state a claim for

denial of procedural rights when he has elected to forego a complete hearing." Id. at 817.[3]

In a case, that reached an opposite result from the above cases, the Fifth Circuit held that the terminated public employees had not received constitutionally sufficient procedural due process. Texas Faculty Ass'n v. University of Texas, 946 F.2d 379 (5th Cir. 1991). The Court stated that

> [the] appellants twice demanded hearings of the sort provided in the Board of Regents' Rules and Regulations, the only grievance procedures of which they were aware, and that their demands were rebuffed each time. Accordingly, we hold that appellants did not waive their right to challenge the termination decisions where they actively sought to involve the procedures to which they in good faith thought themselves entitled, and were not offered a constitutionally adequate alternative. Only where a 'faculty member [] knows that the opportunity for [an adequate] hearing is available and chooses to forego

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[3]In fact, the reason articulated by Plaintiff in this case for her failure to follow the administrative procedures set up to handle employee grievances is similar to the reasons stated by the plaintiff in Correa, frustration with the "system". Taylor: "Q: From February 11th through March 31st of 1993 -- and you were on the payroll during that whole time, are you saying there was no mechanism by which you could have challenged the decision? A: There was no mechanism by which I felt like I needed to challenge the decision. The decision was made. Yes, I could have used the procedures to do that [challenge the decision]."

Correa plaintiff: "After my confrontation with Mr. Burns and the statement that they had evidence against me, I could sense the situation and I didn't want to go for any more harassment."

> that opportunity, [do] they act at their peril.'

Texas Faculty Ass'n, 946 F.2d at 389 (emphasis added), citing Russell, 632 F.Supp. at 1442.

In the present case, Taylor admits to having knowledge of MCC's procedures to challenge administrative decisions.[4] Plaintiff admitted that, while employed at MCC, she knew that MCC had various procedures for complaining about administrative practices, Plaintiff's Deposition at p. 165, and that on at least one occasion, she was provided with a copy of the procedures. Id. Further, Plaintiff acknowledges she never filed a grievance or used the appropriate procedural mechanisms to complain about the alleged promotion loss, about the reorganization and/or classification of her position, or her termination in 1993. Id. at 165-66. In fact, Plaintiff remained on MCC's payroll from February 11, 1993 until the end of March, 1993, but she still failed to use any of the grievance procedures set up by MCC for employee complaints. Id. at 166. When asked during her deposition if she was saying that no mechanism existed for her to challenge her termination, she stated:

> A: There was no mechanism by which I felt like I needed to challenge the decision. The

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[4]MCC has extensive administrative procedures for employees desiring to bring complaints against the University or its employees. See Exhibit C Grievance Procedures, Defendants Dennis Michaelis, Deborah Garrett, Richard Coronado and Mike Jones' Motion for Summary Judgment. In fact, the grievance procedures at MCC provide employees avenues in which to file formal and informal grievances. MCC also provides terminated employees with "due process" procedures to be followed when a tenured employee or employee whose contract has not expired is terminated. Exhibit C Academic Freedom, Responsibility and Tenure at p.6.

decision was made. Yes, I could have used the procedures to do that.

Q: And you did not?

A: No, I did not.

Finally, Plaintiff's complaint that she did not receive procedural due process because she was inadequately informed of the reasons for her termination is misplaced. In a Memorandum written by Jones and signed by Taylor on August 20, 1992, Jones advises Taylor of the many problems he was having with her. For instance, Jones indicates that Taylor fails to follow the proper chain of command when she has a problem:

> I have discussed on numerous occasions the fact that I wanted an opportunity to address any issues in your area before you contact others within the organization. If we are not able to resolve the concerns, problems, or questions on our own, then I will ensure that you will be given the opportunity to solve them at another level.

Additionally, the memo lists Plaintiff's problems with following college procedures as an area of concern,

> As stated in my correspondence of June 23, 1992, I have asked you to submit your requests, forms, and activities in a timely and orderly manner that will enable us to support our programs and to serve the college, the community, and our students in an efficient and effective manner. This means that, except for emergencies, you will need to

> comply with my memorandum of May 29, 1992, which details the deadline for turning in forms for approval. Rarely have you complied with my request to follow these procedures in the past.

Id. at p.1. Finally, Jones lists Plaintiff's failure to follow the diversification policies set by the Personnel Office at MCC as a problem that could lead to termination.

> Finally, in the past few years you have been asked to diversity your staff and your program. The ethnic composition of your staff historically has not reflected the diverse student population (specifically Hispanic) served by the program. Your lack of cooperation in this area has led to confusion for students, staff, and faculty during this summer. Beginning with the Fall Semester, we will follow established college personnel practices and work with the Personnel Office at MCC to employ a diversified staff. This will provide us with an opportunity to look at a variety of applicants well in advance of our need.

Id. at p.1. To add emphasis to the serious nature of the situation Jones states the "[f]allure to follow the directives in this memorandum are grounds for and will result in termination of your employment from MCC." Id. at p. 1-2.

On February 2, 1993, Jones submitted a letter to Garrett, the Vice President of Student Services, recommending that Plaintiff's employment be terminated. Exhibit "F" attached to Affidavit of Michael Jones. In that letter, Jones states that since Taylor was assigned to him his "authority as

a supervisor has been challenged on almost every issue," that she has "lied, harassed, threatened, terrorized and racially slurred members of our staff on numerous occasions," and "consistently disobeyed orders in following EEOC hiring guidelines, following procedures, and requests for cooperation."

In closing, Jones suggests that termination is the only alternative to take because of Plaintiff's repeated refusal to follow his directions. Finally, in a letter dated February 11, 1993, Dennis Michaelis, the President of MCC, states that

> [b]ased upon the recommendation of your supervisors, I am approving termination of your employment with McLennan Community College as of March 31, 1993. You will be relieved of your duties as Coordinator of the Upward Bound Program effective immediately and placed on administrative leave with pay. I regret that this action has to be taken, but your repeated failure to adhere to college policies and directions and your continuing acts of insubordination leave me no choice.

Plaintiff's Exhibit 29. The letter further states that "[i]n the meantime, if you have any questions, please contact Mr. Jesse Alvarez in the Personnel Office." Thus, Plaintiff had constitutionally sufficient notice of the reasons for her termination.

Finally, Plaintiff's complaint alleging a denial of procedural due process because she was not given a post-termination hearing is equally without merit. When a plaintiff fails to avail herself of administrative procedures provided by the state actor, the state cannot be held to have violated a public employee's procedural due process. Dusanek, 677 F.2d

at 543. A plaintiff cannot fail to take advantage of a state remedy and "then argue that the deprivation by the state was the inadequacy or lack of the skipped remedy." Myrick v. Dallas, 810 F.2d 1382, 1388 (5th Cir. 1987).

As stated previously, Plaintiff did not even request a post-termination hearing. Defendant maintains that Taylor has never requested a post-termination hearing, and Plaintiff does not claim to the contrary. In fact, her statements at her deposition support the Defendants' claims. Thus, Plaintiff's procedural due process claims are denied.

F. Termination for Free Speech

In order to successfully assert a § 1983 claim for retaliation based on the denial of free speech, the Plaintiff must establish 1) that the speech involves a matter of public concern; 2) that the "interests of the [employee], as a citizen, in commenting on matters of public concern [outweigh] the interests of the State, as an employer, in promoting the efficiency of the public service it performs through its employees" and 3) that the "employee's discipline was motivated by the uttered speech". Kinsey, 950 F.2d at 992 , quoting, Coughlin v. Lee, 946 F.2d 1152, 1156-57 (5th Cir. 1991); Thompson v. Starkville, 901 F. 2d 456, 460 (5th Cir. 1990); McDonald v. City of Freeport, 834 F. Supp. 921, 930 (S.D.Tex. 1993).

Under the first prong, the Court must determine whether Plaintiff's speech was a matter of public concern. The context, form, and content of a given statement, as revealed by the whole record, affect whether speech is a matter of public concern. McDonald, 834 F.Supp. at 930. Speech that discloses official impropriety or other malfeasance should generally be considered to be a matter of public concern. Connick v. Myers, 461 U.S. 138, 148, 103 S.Ct. 1684, 1691, 75

L.Ed.2d 708 (1983); Conaway v. Smith, 853 F.2d 789, 795 (10th Cir. 1988). Speech that is aimed at uncovering wrongdoing or breaches of the public trust is a matter of public concern. Glass v. Dachel, 2 F.3d 733, 741 (5th Cir. 1993).

On the other hand, speech that is of a purely personal motive or involves personal employment conditions is not protected by the First Amendment. Ayoub v. Texas A & M University, 927 F.2d 834, 837 (5th Cir. 1991), cert.denied, 502 U.S. 817 (1991); Knowlton v. Greenwood Independent School Dist., 957 F.2d 1172, 1178 (5th Cir. 1992). As the Fifth Circuit emphasized in Ayoub,

> [b]ecause almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in his role as employee. In making that determination, the mere fact that the topic of the employee's speech was one in which the public might or would have a great interest is of little moment.

Id. at 836, citing Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 n.2 (5th Cir. 1982) (holding that the plaintiff's comments were those of an employee and not of a citizen).

In the present case, Taylor cites four general areas of protected speech which she believes led to her termination. Taylor claims that she was terminated because she opposed

racial slurs and epithets that appeared in educational materials at MCC, that she participated in a general investigation into the allegations of discriminatory employment practices at MCC in 1991, that she voiced opposition to the College's refusal to hire additional instructionors for the Upward Bound Program until a Hispanic instructor had been hired, and that she was not given sufficient resources.

Her "speech" given in 1991 to the Office of Civil Rights is not a matter of public concern. While an employee's "speech" may still be a matter of public concern if it contains an element of personal interest, the employee "cannot transform a personal conflict into an issue of public concern simply by arguing that individual concerns might have been of interest to the public under different circumstances." Dodde v. Childers, 933 F.2d 271, 273 (5th Cir. 1991). Thus, when an employee's complaint centers on his employment situation and personal life rather than the public interest in being informed of the government's violation of federal law, the matter is not of public concern. Knowlton, 957 F.2d at 1178 (holding that because the employee's complaints of interference with family life and the added concern of hiring baby sitters was of equal, if not greater, concern then the school's violation of federal law, the employees' complaints involved a matter of private not public concern).

Plaintiff's own affidavit reflects that her complaints to the Civil Rights Investigator in 1991 were matters of personal concern. Plaintiff states that,

> [t]he essence of my testimony to the Office of Civil Rights was that I felt I had been discriminated against because I had not been allowed to apply for a new position that was created in a reorganization or classification that occurred in 1990 and early 1991. I did

> not file an official complaint of discrimination in connection with the 1991 incident, even though the College's Personnel Director and Affirmative Action and EEOC Officer, Richard Coronado, expressly told me that the College had violated a protected class in the manner in which they filled the position for which I had applied.

Taylor Affidavit at p.2. (emphasis added). Thus, while an employee's complaint about racial discrimination might generally be of "public concern," Plaintiff's affidavit in this case reveals that their complaints were really of personal nature. Plaintiff cannot be allowed to turn a purely personal complaint about the failure of MCC to appoint her to a particular position into a complaint of general racial discrimination. Plaintiff's discussion with the Civil Rights Officer in 1991 is not a matter of public concern.

In addition, when an employee's complaint touches on matters involving internal office policy or procedures, such matters are not of public concern. See Connick, 103 S.Ct. at 1691-92. Thus, a plaintiff's frequent complaints about university procedures, employees, and policies does not qualify as "protected speech" under the First Amendment; such "speech" is "quintessentially a matter of personal concern not protected by the constitution". Grassinger v. Welty, 818 F.Supp. 862, 871 (W.D.Pa. 1992), aff'd without opinion, 993 F.2d 224 (3rd Cir. 1993); see also, Assa'ald-Faltas v. Virginia., 738 F.Supp. 982, 986 (E.D. Va. 1989)(dismissing Plaintiff's First Amendment claim because her complaints about the appropriate medical protocol to be followed was of personal not public concern).

Plaintiff, in an attempt to allege as many facts as possible, states that she was discriminated against because she

did not receive a computer and was denied other benefits given to other programs. However Plaintiff's complaint is purely a private one involving internal office policy and procedures. Plaintiff's complaint is "quintessentially" a matter of personal not public concern. Plaintiff's complaints about the racial epithets and hiring procedures are possibly matters of public concern.

Under the second prong, the Court must determine whether the state's interest in efficient management of its operations outweigh the employee's interest in commenting upon the matters of public concern. Brawner v. Richardson, 855 F. 2d 187, 192 (5th Cir. 1988). When performing this balancing test, the court looks to such factors as 1) the likelihood that controversy and disruption will occur; 2) the possible impediment of the department's general performance; and 3) the affect on working relationships necessary to the department's proper functioning. Id. at 192. Other courts have suggested that the court examine such factors as 1) whether the employee's actions involve "public concerns"; 2) whether "close working relationships" are essential to fulfilling the employee's responsibilities; 3) the time, place and manner of the employee's activity; 4) whether the activity can be considered "hostile, abusive, or insubordinate"; and 5) whether the activity "impairs discipline by superiors or harmony among co-workers". Click v. Copeland, 970 F.2d 106, 112 (5th Cir 1992).

In the present case, MCC's interest in efficient management of its operations clearly outweigh Taylor's interest in commenting on MCC's request for her to diversity her staff. Assuming arguendo that Plaintiff was told she could not hire any Blacks or Whites until she hired an Hispanic, MCC's interest in the efficient management of its operations outweigh her interest in commenting upon matters of public concern.

Under the test established in Click, the time, place and manner of Plaintiff's complaints suggest that her complaints were personal in nature and not intended to "protect" the public interest of discrimination free work places. Based on all the documentation submitted, Plaintiff apparently never communicated her "concerns" to anyone outside MCC. If Plaintiff were truly concerned with the discriminatory effects of MCC's policy, she would have sought outside help to stop it. The Defendants have submitted memos and reports indicating their desire for Plaintiff to advertise positions available in her department in order to attract more qualified Hispanic candidates. However, Plaintiff did not submit any information that she protested the polices at the time she alleges the discrimination was occurring. In fact, a careful reading of Plaintiff's affidavit reveals the contrary. Throughout her affidavit, Plaintiff states that she was disciplined for failing to advertise her positions because she thought this was a discriminatory practice. However, Plaintiff never makes the simple statement that "I told the administration that hiring only Hispanics at the cost of qualified black and white applicants is discriminatory and should not be done." Instead, Plaintiff lists pages and pages of affidavit testimony stating that such practice was discriminatory, and she was terminated for refusing to engage in such discrimination.

Finally, Taylor's actions clearly could be considered "hostile, abusive, and insubordinate" and would "impair the discipline by superiors [and] harmony among co-workers." Because many of the facts required to analyze this prong are contained in the Court's analysis under the third prong, the Court declines to engage in an in-depth analysis of this issue here.

Under the third prong, the Plaintiff must show that her discipline was motivated by the uttered speech. Ordinarily

summary judgment is inappropriate for the issue of whether an employee's protected conduct was substantial or motivating factor in an employer's decision to take action against the employee because this issue is ordinarily a question of fact. Click, 970 F.2d at 113. See also, Wilson v. UT Health Ctr., 973 F.2d 1263, 1270 (5th Cir. 1992), cert. denied, 113 S.Ct. 1644 (1993)(reversing and remanding case to district court in order to let a jury decide whether the Plaintiff was dismissed because she exercised her freedom of speech).

However, if the defendant has shown the absence of any evidence of "causation," the plaintiff has a duty when responding to a defendant's motion for summary judgment to present the court with factual assertions that create a material issue of fact. See generally, Cleckner, 556 F.2d at 771. The plaintiff, in an retaliatory discharge case, must come forward with facts indicating that the exercising of his constitutional rights was a "substantial" or "motivating" factor in the defendant's actions. Mt. Healthy City Sch. Dist. Board of Educ. v. Doyle, 97 S.Ct. 568, 576 (1977). In federal court, the plaintiff cannot rely on mere conclusory allegations. See Gossett, 569 F.2d at 87. Instead, she is required to go beyond the pleadings, and by way of affidavits, depositions, answers to interrogatories, etc., demonstrate specific material facts that give rise to a genuine issue of material fact. Celotex, 106 S.Ct. 2551-52. A defendant cannot be held liable for violating a plaintiff's First Amendment rights if he did not know of the protected speech. Cusson-Cobb v. O'Lessker, 953 F.2d 1079, 1081 (7th Cir. 1992), see also, Caldwell v. Elwood, 959 F.2d 670, 672 (7th Cir. 1992)(affirming the district court's granting of defendant's motion to dismiss based on the plaintiff's failure to plead that the defendants knew of the protected speech that allegedly caused the discrimination). Further, a plaintiff does not establish the prerequisite "causation" merely because he was fired after filing a lawsuit. O'Connor v. Chicago Transit Authority, 985 F.2d 1362, 1370 (7th Cir.

1993). In fact, when there has been a lapse of time between the alleged "protected speech" and the adverse employment decision, the plaintiff's argument of retaliation is seriously under-cut. Id. at 1370; McClure v. Cywinski, 686 F.2d 541, 546 (7th Cir. 1982)(three and one-half months between "speech" and adverse employment decision).

In Vukadinovich v. Board of Sch. Trustees, 978 F.2d 403, 408 (7th Cir. 1992), cert. denied, 1145 S.Ct. (1993), the Seventh Circuit affirmed the district court's granting of summary judgment of the defendants where the plaintiff had alleged a violation of his first amendment rights. The Court stated that the plaintiff had not alleged a link between his 1986 comments and his discharge until more than two years later, the year he filed his lawsuit. The school renewed his contract twice after he engaged in the alleged "protected speech". Thus, the Seventh Circuit agreed with the district court's decision that no reasonable jury could conclude that the plaintiff's comments were a substantial or motivating factor in the decision to terminate his employment. Id. at 408. The court further emphasized that at least two members of the board who were sued were not members when the plaintiff engaged in the protected speech, and the defendants steadfastly maintained that the plaintiff's criticism of the board played no role in their decision to terminate his employment. Id. at 408 n.2.

In the present case, Plaintiff fails to provide any "causal connection" between her termination and her protest of the inclusion of racially derogatory terms in some of the course books used at the College. First, the time period between her "speech" and her termination shows that the "causal link" is a tenuous at best. While a lapse of time between a Plaintiff's speech and the adverse employment action is not dispositive, Plaintiff fails to provide any explanation as to why the College

would wait three years before terminating her employment.[5] Clearly, had MCC wanted to "discipline" her for protesting certain words in books used at the College, they would have done so sooner. Second, Plaintiff, in her own affidavit, indicates that the College stopped using the "offending text books" after she complained. This fact alone, instead of showing a lack of concern for racial relations, indicates a willingness on the part of MCC to maintain an equal opportunity environment.

Plaintiff also fails to show that her complaints about the lack of a computer was a "cause" for her termination. In her own affidavit, Plaintiff states

> I have no documents to substantiate my claim that I was treated differently than my white counterparts in purchasing a computer in August, 1991. I acknowledge that the President sent a memo stating that no equipment purchases would be authorized after August 10, 1992, and I acknowledge that my request for the purchase of a computer was submitted after the cut-off date."

Taylor Affidavit at p. 14-15. Realizing that such a statement does not even remotely rise to the level of discrimination, Plaintiff states that someone told her a white female in an entirely different area of the college submitted a request to purchase equipment and it was approved. Besides the obvious hearsay implications of such a statement, Plaintiff fails to state what the "equipment" was, provide summary judgment evidence of any information or documentation that the white female in fact did purchase the equipment after the cut-off date, or recognize that different departments in the college

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[5]Plaintiff made the complaints in 1990, but she was not terminated until 1993.

may have different levels of technological needs, assuming of course that the "equipment purchased for the white female was in fact a computer.[6]

In addition to being purely personal in nature, Plaintiff fails to provide a causal connection to her termination in 1993 and her complaints to the Civil Rights Officer in 1991. First, Plaintiff again fails to explain the significant period of time between her "speech" in 1991 and her termination. Second, Plaintiff fails to provide sufficient summary judgment evidence to "put at issue" Defendants' claims that she was terminated because of her insubordination and her failure to follow MCC's procedures.

Plaintiff interprets her termination letter of February 11, 1993 as meaning that she was terminated because she was opposing the College's alleged desire to hire only an Hispanic. However, taken in conjunction with the documents filed by the Defendants, this is clearly not the case. Plaintiff seeks to turn the College's desire to have her program more accurately reflect the racial composition of her students into a claim of racial discrimination. However, MCC's summary judgment evidence indicates that the purpose was to follow EEOC guidelines and to have the staff members of MCC reflect the composition of the students. This fact is especially important in programs like Upward Bound where the purpose is to

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[6]In passing, the Court notes that this is another example of the internal inconsistency of Plaintiff's claims. Throughout her complaint, Plaintiff asserts that she was racially and sexually discriminated against by the Defendants. The Court is unclear how the alleged granting of a "special benefits" to another female bolsters her claim that she was sexually discriminated against by the Defendants. Instead, the example cited by Plaintiff shows the inconsistency of her claims because she repeatedly flips back and forth between her discrimination claims and just "throws out" examples "hoping" that the Court will "buy into" her conclusory version of the events.

encourage students from disadvantaged backgrounds to stay in school and to realize that they can achieve success through education. By having someone of a like race serve as an instructor, the goals of the program are furthered because he serves as a role model that "someone like me" can succeed.

In his affidavit, Jones claims that he told Taylor her methods of hiring were not leading to the proper diversification of the program because one third of the students in the Upward Bound Program were Hispanic but none of the staff was Hispanic. Thus, Jones told Taylor she should diversify her staff and should advertise her vacancies so that she could attract as many applicants as possible. Additionally, the federal grant application under which the program operated required diversification in the make-up of the staff. "In regard to stated goals and timetables, the College will employ ethnic minorities and women in classified positions at the same level representation as the ethnic and sex compensation of the general population and labor force in McLennan County." Additionally, Jones says that

> Ms. Taylor refused to advertise and selected individuals of her own choosing. Ms. Taylor's problems were documented as early as 1990. In May, 1992, Ms. Taylor again submitted a list of recommendations of employees without complying with the procedures. I informed her that the positions had to be advertised. In June, 1992, however, Ms. Taylor allowed five individuals to begin performing duties, without proper authorization and over my expressed objection. As a result, the employed individuals received no pay checks for two months. During this two month period, I made numerous oral and written requests to Ms. Taylor for information concerning the employees, but she

> failed to respond. When she did respond, she stated that she did not understand what I wanted.

Exhibit 2; See also Memo Exhibit 2.A.

Garrett, Plaintiff's next level supervisor, also notes that she had problems with the Plaintiff concerning her willingness to attract Hispanics for the Upward Bound staff.

> The student population of Upward Bound was one-third white, one-third black, and one-third Hispanic. The grant submission documentation stated that the staff would mirror the student population, yet Ms. Taylor had no Hispanic employees. Although Ms. Taylor was never told to hire Hispanics at the exclusion of other more-qualified applicants, we did encourage her to go beyond the same pool of individuals that she relied on. We directed her to advertise the positions in the hope of attracting more-qualified Hispanics. My predecessor documented Ms. Taylor's failure to diversify. In May, 1992, Ms. Taylor's slate of candidates was not approved because of her failure to open the process to others. The rejection of her candidates was not based on Ms. Taylor's race or sex, but rather, was based on our sincere desire to communicate to Ms. Taylor that the administration was serious about opening up the hiring process to attract qualified candidates.

Garrett Aff. Ex. D.3.

Additionally, Jones states that "[f]rom the beginning, Ms. Taylor resisted my supervision and challenged my

authority. I perceived that she felt it beneath her to report to someone who was a director (rather than a vice president) and to report to someone who had a bachelor's degree (Ms. Taylor had a master's degree)." Defendant's Exhibit 2, Jones Affidavit. Plaintiff, in fact, does state in her own affidavit that MCC sexually discriminated against her because Jones was promoted over her although Plaintiff had a higher level of education.

According to Jones, Plaintiff's termination was also recommended because she did not follow the proper chain of command. Jones states "Ms. Taylor challenged my authority by attempting to report directly to Dr. Garrett on some matters despite my instructions to her to respect the chain of command." Exhibit 2.1 ("On three occasions we have discussed the fact that I wanted an opportunity to address any problems in our area before they were taken up the chain of command. The discussion included the importance of communicating to me through the proper administrative channels as in the college organizational chart. . .You stated that you understood my position and that we would have not problems in this area. Since that time there have been repeated violations of this directive.")

In her attached affidavit, Garrett, the Vice-President of Student Affairs, states that Plaintiff was consistently insubordinate and regularly violated the chain of authority.

> It was my perception that Ms. Taylor bypassed Mr. Jones even on routine matters. We tried to re-enforce the importance of following the chain of command. Ms. Taylor, however, was openly hostile to Mr. Jones' authority. For example, in the spring of 1992, I once called a meeting with Ms. Taylor and the Upward Bound staff. I also invited Mr. Jones as her new supervisor to the

> meeting. In the presence of her staff, Ms. Taylor told Mr. Jones to leave. On other occasions, Ms. Taylor also behaved inappropriately toward me. For example, Taylor once told me that I could not talk to her staff without her permission. As vice-president of student services, I have the authority to talk to college employees about matters within my authority.

Garrett Affidavit D Ex. 3.

In addition to failing to properly follow the chain of command, Defendants claim that Plaintiff was terminated because she failed to comply with internal rules and regulations. Jones states Plaintiff repeatedly failed to timely file required documentation. For example, Plaintiff failed to timely turn in travel authorization forms. Jones states

> Ms. Taylor left a travel authorization form under my door after 5:00 p.m. for a trip scheduled at 7:00 a.m. the next day. Without prior approval, Ms. Taylor took her personal car on the trip instead of riding the bus provided by the college; there was room on the bus for Ms. Taylor. She then requested reimbursement on this trip despite the fact it was not authorized. Two other faculty members also took their personal vehicles on this trip. Neither of these individuals requested or received reimbursement.

Exhibit 2. See also Memo Exhibit 2.A.

In an effort to get Plaintiff to comply with his directives, Jones wrote Plaintiff a memo. Jones emphasized his desire to cooperate with Plaintiff and urged her to comply

with applicable administrative procedures. Jones stated that he has previously "asked that all concerns be expressed directly to [him] before taking them to upline administrators." Jones further states that Plaintiff violated this directive when she "scheduled a meeting with Dr. Garrett to discuss concerns in her area" before talking to him directly and she "went directly to the President to ask information concerning her budget" both of which were in violation of the agreement she signed agreeing to discuss such matters with him first. Exhibit 2, E.

Finally, giving Plaintiff "one last chance," Jones wrote a memo to Plaintiff on August 10, 1992 and specified his requirements for her continued employment. In that memo, Jones states that he has, over the last three months, discussed his expectations and concerns regarding her performance with the Upward Bound Program. Jones informs her that she will be terminated if she fails to follow his directions in the future. First, Jones informed Plaintiff that she, as he had discussed on previous occasions, must discuss with him first any problems she might have with her program, and "[i]f we are not able to resolve the concerns, problems, or questions on our own, then I will ensure that you will be given the opportunity to solve them at another level." Exhibit 2, E August 10, 1992 Memo. Second, he informed Plaintiff that she must submit all requests, forms, and activities in a timely and orderly manner as detailed in his memorandum of May 29, 1992, which indicates the deadlines for turning in her forms needing prior approval. "Rarely have you complied with my request to follow these procedures." Id.

During the fall semester, Jones claims that his relationship with Plaintiff remained tense, and he met with her on several occasions. Jones states that on one occasion, Plaintiff upset his staff greatly when she called his office fourteen times in one day demanding that he immediately

locate the president and vice-president for approval of a document that she had given him at the last minute.

Based on the above actions, Jones, in February, 1993, recommended to Dr. Garrett that Plaintiff be dismissed. In his memorandum, Jones recommended that she be dismissed because of her disregard for MCC policies and her insubordination. See Ex. 2, F Memo to Garrett. Jones states that Taylor had challenged his authority "on almost every issue". Jones claims that Plaintiff "lied, harassed, threatened, terrorized and racially slurred" staff members on numerous occasions and that she "consistently used tactics to subvert, resist and delay requests from his office." Additionally, Jones points out that he has discussed his problems with her and recommended changes in her work attitude and performance, but she has refused to change her insubordinate behavior. Thus, Jones recommended that her employment be terminated. Garrett, agreeing with Jones, wrote a memorandum to President Michaelis approving Plaintiff's termination. In apparent agreement with Jones and Garrett, Michaelis wrote Plaintiff on February 11, 1993 informing her that she was terminated.

In conclusion, Plaintiff fails to provide sufficient summary judgment proof indicating that she was terminated for any constitutionally protected speech. Defendants' proof indicates the contrary. Plaintiff's First Amendment claim is dismissed.

G. Racial Discrimination: Title VII, §1981 and §1983

When faced with a claim of employment discrimination under Title VII, the essential issue in the case is whether the defendant intentionally discriminated against the Plaintiff. United States Postal Serv. Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). The burden of proving "intentional

discrimination" is at all times on the plaintiff. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Thus, it is the plaintiff's responsibility to come forth with sufficient evidence to raise an inference that the employer's conduct was racially motivated. Wilson v. Stroh Cos, 952 F.2d 942, 945 (6th Cir. 1992).[7]

A plaintiff may prove intentional discrimination either with direct or indirect (inferential) evidence. Davis v. Chevron, USA, Inc., 14 F.3d 1082, 1085 (5th Cir., 1994). Direct evidence of discrimination is the exception not the rule. Id. at 1085. Evidence of direct discrimination exists when the employer places a substantial negative reliance on an illegitimate criterion in reaching an employment decision. Id. In the context of employment discrimination cases, "[d]irect evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." Id. at 1085; Brown v. East Miss. Elec. Power Ass'n., 989 F.2d 858, 861 (5th Cir. 1993). Direct evidence of discrimination exists when a terminated employee's supervisor openly and routinely uses racial slurs, Davis, 14 F.3d at 1085, or when one partner refers to the plaintiff as "macho", another suggests that she overcompensates for being a woman, a third tells her to go to charm school, and a fourth advises her to talk more femininely, dress more femininely, and wear more jewelry. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). These comments are "direct evidence" of discrimination

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[7]Plaintiff additionally asserts that she was discriminated against in violation of 42 U.S.C. §§1981 and 1983. The burden of proof in a §1981 case is the same as the burden of proof in a Title VII action. See Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Dooley v. Ft. Worth Independent School Dist., 686 F.Supp. 1194, 1201 (N.D.Tex. 1987), aff'd, 866 F.2d 418, cert. denied, 490 U.S. 1107 (1989). Additionally, when a section 1983 claim is used as a parallel remedy with a Title VII claim in a discrimination suit, the elements of the cause of action are treated the same under both statutes. Irby v. Sullivan, 737 F.2d 1418, 1431 (5th Cir. 1984).

because they cannot be interpreted as anything other than a reflection of bias - either racial or sexual. Davis, 14 F.3d at 1085.

If a plaintiff is unable to prove discrimination with "direct evidence", she may prove discrimination by "inference." A plaintiff may inferentially establish a claim of discrimination by following the test discussed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Burdine, 450 U.S. at 248. The test articulated in these cases sets the procedural mechanisms that gave procedural mechanisms that govern discrimination cases. Under this test: 1) the plaintiff must prove, by a preponderance of the evidence, a prima facie case of discrimination; 2) if the plaintiff is successful, the burden shifts to the defendant to articulate a non-discriminatory reason for its decision; and 3) if that is done, the plaintiff may attempt to demonstrate that the defendant's proffered reason(s) is pretextual. St. Mary's Honor Ct. v. Hicks, 113 S. Ct. 2742, 2747 (1993).

In the present action, Plaintiff alleges that she suffered both disparate treatment and was subject to retaliatory discharge. In order to prove a disparate treatment claim, the plaintiff must generally prove: 1) that she is a member of a protected class; 2) that she was qualified for the job for which she applied or from which she was discharged; 3) she was not offered the job or was discharged; and 4) she was replaced by or the position as given to a non-minority. McDaniel v. Temple Independent School Dist., 770 F.2d 1340, 1345-46 (5th Cir. 1985). See generally, Hicks, 113 St. Ct. at 2747 (disparagement *[sic]* treatment case). In order to prove a retaliatory discharge claim, the plaintiff must show: 1) she engaged in an activity protected by Title VII; 2) an adverse employment action occurred; and 3) there is a causal connection between the participation in the protected activity and the adverse employment action. McDaniel, 770 F.2d at

1346, McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983). However, both claims, disparate treatment and retaliatory discharge, require some showing of a "causal nexus" between the Plaintiff's protected status and the discriminatory action taken. Wilson, 952 F.2d at 945.

Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the action taken. Hicks, 113 S.Ct. at 2742. Therefore, the employer is not required to prove the absence of a discriminatory motive. Id. Instead, the employer need only articulate some legitimate non-discriminatory basis for its decision. Id.

If the employer satisfies this burden of production, the plaintiff may prevail only if she proves that the employer's stated reasons for her dismissal are merely a "pretext" or "ruse" designed to conceal its discriminatory motive. Davis, 14 F.3d at 1087; See also, Burdine, 450 U.S. at 255. Thus, if the defendant provides the court with sufficient summary judgment proof of a legitimate reason for not promoting or terminating her employment, the burden shifts to the plaintiff to proffer evidence that the decision was "pretextual". Davis, 14 F.2d at 1088; See also, Sample v. Schuller, Inter., Inc., 836 F.Supp. 876, 880-82 (S.D.Ga. 1993) (granting defendant's motion for summary judgment because the plaintiff failed to provide sufficient summary judgment proof that the defendant's articulated reasons for his termination were pretextual); Armstrong v. City of Dallas, 997 F.2d 62, 65 (5th Cir. 1993) (granting defendant's motion for summary judgment because plaintiff failed to produce sufficient summary judgment proof that the defendant's articulated reasons for her termination were pretextual); Aikens v. Banana Republic, 877 F.Supp. 1031, 1039 (N.D.Tex. 1995) (dismissing plaintiff's Title VII claim because she failed to establish a prima facie case). An employee's own subjective belief of racial

discrimination is insufficient to prevent the granting of summary judgment. Aikens, 877 F.Supp. at 1038 citing Little v. Republic Refining Co., 924 F.2d 93, 96 (5th Cir. 1991); Sherrod v. Sears & Roebuck Co., 785 F.2d 1312, 1316 (5th Cir. 1986); Elliott v. Group Medical & Surgical Serv. 714 F.2d F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984). Mere naked allegations or a mere scintilla of evidence cannot prevent the granting of summary judgment. Davis, 14 F.3d at 1087. In her Response to Defendant's Motion for Summary Judgment, Plaintiff fails to provide the Court with any "direct" evidence of disparate treatment or other discrimination. Thus, in order to survive Defendant's Motion for Summary Judgment, Plaintiff must prove her claims of disparate treatment and/or retaliatory discharge inferentially.

Plaintiff fails to provide the Court with sufficient summary judgment proof to establish a prima facie case for a disparate treatment claim. In order to establish a prima facie case, the plaintiff must show that she was replaced by a person who is not a member of a protected group to which the plaintiff belongs. Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592 (5th Cir. 1992); McDaniel, 770 F.2d at 1345-46. In Borris v. Hartmarx Specialty Stores, 913 F.2d 253, 255 (5th Cir. 1990), the Fifth Circuit stated that the district court correctly concluded that the plaintiff had established a prima facie case of discrimination because "[t]he evidence established that Norris [the Plaintiff] is black, that she was qualified for her job, that her employer had discharged her, and her employer replaced her with a white women *[sic]*." (emphasis added). Additionally, it is important to note that the district court had dismissed another plaintiff's claim for the failure to establish a prima facie claim. The district court held that this plaintiff could not establish a prima facie case because "she could not prove an essential element of her case--that her employer had filled her position with a non-minority". Id. at 254.

In response, Plaintiff claims that the Title VII does not require that she be replaced with someone outside her protected class. Plaintiff cites Meiri v. Dacon, 759 F.2d 989, 996 (2nd Cir. 1985), for the proposition that she does not have to prove she was replaced by someone outside her protected class. However, this case is never cited by the Fifth Circuit, and it appears that no other circuit has adopted the logic contained in this case. Every Fifth Circuit case seems to have required proof of this element in a disparate treatment claim. See Young v. Houston, 906 F.2d 1977, 180 (5th Cir. 1990); Norris, 913 F.2d at 254-55. Also, the Supreme Court in Hicks, 113 S.Ct. at 2747 stated that the defendant did not challenge the district court's finding that the plaintiff had established a prima facie case, when she proved "(1) that he was black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man." (emphasis added). Thus, the Plaintiff's reliance on the Second Circuit opinion, without any reference to either Fifth Circuit or Supreme Court cases, is unpersuasive.

Assuming, arguendo, that Plaintiff establishes claims of disparate treatment and retaliatory discharge based on race, Plaintiff fails to demonstrate that the Defendant's proffered reasons for her termination are pretextual. Defendants have clearly satisfied their burden of production by articulating non-discriminatory reasons for terminating Plaintiff's employment. See II(F): Termination for Free Speech.

Additionally, as exemplified by the extensive discussion in section II(F), Plaintiff cannot provide the Court with sufficient summary judgment evidence that the Defendants'

articulated reasons for her termination were pretextual.[8] Defendants have submitted numerous documents indicating that the Plaintiff had been insubordinate and unwilling to follow the directives of her superiors. The affidavits and written reprimands by her supervisors reveal a pattern of insubordination and hostility that eventually led to her termination.

In contrast, Plaintiff fails to satisfy her summary judgment burden by showing that the Defendants' articulated reasons are pretextual. Plaintiff's complaints about the alleged racially insensitive words in educational materials were addressed by MCC years before she was terminated. Thus, Plaintiff's claims that this incident shows that she was subject to discrimination when she was terminated is incorrect.

Additionally, Plaintiff's complaints to the Office of Civil Rights clearly could not be used to show that the Defendants' articulated reasons for her termination were pretextual. Again, Plaintiff's complaints to the Civil Rights Office occurred years before her termination. The Office of Civil Rights found that no discrimination had occurred at MCC and Plaintiff fails to provide any connection between her termination and her complaints.

Furthermore, Plaintiff's complaints concerning the allocation of resources at MCC is insufficient to show that Defendants' articulated reasons are pretextual. The evidence submitted by both the Plaintiff and the Defendants clearly reveal that such decisions were racially neutral. (See Section II(F) Free Speech section concerning the allocation of

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[8]The Court declines to go through the same in-depth discussion provided in the Free Speech section. The discussion concerning these memos and affidavits is incorporated by reference in this section.

resources, e.g. the computer that she was not allowed to purchase).

Plaintiff's reliance on the Defendants' alleged refusal to hire additional persons for her Upward Bound Program until she sought to diversify the staff does not in any way show that the Defendants articulated reasons were pretextual. In fact, the affidavits and memos discussed in the previous section indicate that Plaintiff was told to follow the procedures so that the composition of her staff would more likely reflect the diversity of the students in the program. The federal grant MCC received for the program required that the College try to make the staff reflect the diversity of the students in the program. Based on the uncontradicted evidence submitted by the Defendants, the racial mix of the student population was one-third white, one-third black, and one-third Hispanic. However, the staff did not have a single Hispanic while the Plaintiff was in charge. Requiring the Plaintiff to "try and diversify" the program does not in any way establish that Defendants' articulated reasons for her termination were merely pretextual.

Finally, the Court notes it is instructive that the individual who appears to have been one of two important persons in the decision to terminate her employment was an African-American male. While this is not dispositive, it reflects the general conclusory and internal inconsistency of Plaintiff's allegations of discrimination. Consequently, Plaintiff's conclusory allegations are insufficient to contradict the Defendants' articulated non-discriminatory basis for her termination. Plaintiff's own "subjective belief" that she was subject to racial discrimination is insufficient to create a material dispute of fact concerning her termination.

H. Sexual Discrimination

Plaintiff alleges that, in addition to racial discrimination, the Defendants sexually discriminated against her. Plaintiff apparently bases her sexual discrimination claims on §1983 and Title VII. Plaintiff fails to provide any in-depth discussion of how she was subject to sexual discrimination; consequently, the Court likewise declines to do so. Instead, the Court relies on the two previous sections in support of its decision dismissing Plaintiff's sexual discrimination claims.[9]

While not a disparate treatment case, the Court notes that the Fifth Circuit recently recognized the inherent tension between the protection of women in the work-force and the general problems that are common to any working environment. De Angelis v. El Paso Mun. Police Officer's Assn, 51 F.3d 591 (5th Cir. 1995).

As recently recognized by the Fifth Circuit, a hostile environment claim protects women against extremely insensitive and egregious conduct in the workplace. Id. at 593. "Any lesser standard of liability, couched in terms of conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality." Id. A less onerous standard of liability which attempts to insulate women from every day insults, as if they remained models of Victorian reticence, mandates not equality

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[9]Further, Plaintiff fails to meet her burden of establishing a prima facie case of sexual discrimination. After Plaintiff was fired, she was replaced by a female. Additionally, even if Plaintiff alleges a prima facie case, Plaintiff does not satisfy her burden of showing that the legitimate articulated reasons by the Defendants for her termination are pretextual. Most, if not all, of Plaintiff's allegations involve issues of a racial nature, e.g. the complaints concerning the books in 1991 and the diversity problems with the Upward Bound program. Plaintiff fails to point to any evidence even remotely suggesting that the Defendants used sexually related criteria when considering her termination.

but preference for women. It creates incentives for employers to bend over backward in women's favor for fear of lawsuits. Id. "Now that most American women are working outside the home, in a broad range of occupations and with ever increasing responsibility, it seems perverse to claim that they need the protection of a preferential standard." Id. (reversing and rendering judgment for the defendant police association after a jury found the defendant association liable for sexual harassment under Title VII). Thus, based on the foregoing, Plaintiff's claims of sexual discrimination are dismissed.

I. Intentional Inflection of Mental Anguish

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove that" (1) the defendant acted intentionally or recklessly; (2) the conduct was "extreme" and "outrageous;" (3) the actions of the defendant caused the Plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993); Johnson v. Merrell Dow Pharmaceuticals, Inc., 965 F.2d 31, 33 (5th Cir. 1992). In Dean v. Ford Motor Credit Co., 885 F.2d 300, 306 (5th Cir. 1989), the Fifth Circuit Court of Appeals defined extreme and outrageous conduct as follows:

> [W]here the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. . . . Generally, the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim "Outrageous."

Dean, 885 F.2d at 306 (citing Restatement (Second) of Torts §46, Comment d (1965)). Additionally, the Restatement also

provides limits on what conduct may be found to be outrageous by stating that liability "does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. . . [t]here is no occasion for the law to intervene in every case where someone's feelings are hurt." Restatement (Second) of Torts §46. Moreover, a claim for intentional infliction of emotional distress will not lie for mere "employment disputes." Johnson, 965 F.2d at 33. The court must make the initial determination of whether the defendant's conduct may "reasonably be regarded as so extreme and outrageous as to permit recovery." Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993) (quoting Restatement (Second) of Torts §46 cmt. h (1965)).

Under Texas law, an employer's mere termination of an at-will employee does not constitute extreme and outrageous conduct. Wornick, 856 S.W.2d at 732. As the Texas Supreme Court has stated:

> Termination of an employee is never pleasant, especially for the employee. But if we were to accept Casas' arguments in this case, employers would be subjected to a potential jury trial in connection with virtually every discharge and 'there would be little left of the employment-at-will doctrine.'

Id. at 736 (quoting Mendez, 844 S.W.2d at 202). Thus, an intentional infliction of emotional distress claim will not generally arise in the employment context even where the conduct was deplorable or rises to the level of illegality. Thompson v. City of Arlington, 838 F.Supp. 1137, 1154 (N.D. Tex. 1993), citing Johnson, 965 F.2d at 33; Wilson, 939 F.2d at 1145; Horton v. Montgomery Ward & Co., 827 S.W.2d 361, 369 (Tex. App.--San Antonio 1992, writ denied). In fact, in Ugalde v. W. A. McKenzie Asphalt Co., 990 F.2d 239, 243

(5th Cir. 1993), the Fifth Circuit held that a supervisor's reference to the plaintiff as a "Mexican" and a "wet back" did not rise to the level of outrageous conduct necessary to support a claim of intentional infliction of emotional distress. But see, Prunty v. Arkansas Freightways, Inc., 16 F.3d 649, 654 n. 14 (5th Cir. 1994) (holding that Plaintiff established an intentional infliction of emotional distress claim because of the acrimonious nature of the charges and the pervasiveness of the comments).

In the present case, Plaintiff's intentional infliction of emotional distress claim fails. First, MCC, in its Motion for Summary Judgment, states that Plaintiff cannot pursue an intentional infliction of emotional distress claim against it because governmental immunity bars such suits. Plaintiff concedes this point. "Taylor concedes that her claim for intentional infliction of emotional distress [against MCC] is barred by governmental immunity." Plaintiff's Reply to MCC's Motion for Summary Judgment at p. 6.

Second, Plaintiff's intentional infliction of emotional distress claim against the individual defendant also fails. First, Plaintiff has failed to provide sufficient summary judgment proof that she was terminated because of racial or sexual discrimination. Plaintiff has likewise been unable to persuade the Court that she was retaliated against for filing a worker's compensation claim. Thus, the facts in this case clearly do not rise to the level of "outrageousness". Additionally, even if Plaintiff could establish that she was terminated for any of the reasons she suggests, the facts in this case do not "go beyond all bounds of decency" so "as to be regarded as atrocious and

utterly intolerable in a civilized society." Consequently, Plaintiff's mental anguish claim is dismissed.[10]

J. Retaliation for Filing a Worker's Compensation Claim

Section §451.001 of the Texas Labor Code creates a cause of action for an employee who is terminated in retaliation for filing a worker's compensation claim. The statute provides:

> [n]o person may discharge or in any other manner discriminate against an employee because the employee filed a claim, hired a lawyer to represent [her] in a claim, instituted, or cause to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Burfield v. Brown, Moore & Flint, Inc., 51 F.3d 583, 589 (5th Cir. 1995), quoting Swearingen v. Owens-Corning Fiberglass Corp., 968 F.2d 559, 561 (5th Cir. 1992). However, the act creates liability only for "employers." §401.001(18). According to the Act, an "employer" is a "person who makes a contract for hire, employs one or more employees, and has worker's compensation insurance coverage." §401.011(18); See also Stoker v. Furr's Inc., 813 S.W.2d 719 (Tex. App.--El Paso 1991, writ denied).

The statute of limitations for a claim brought pursuant to §451.001 is two years. Thurman v. Sears, Roebuck & Co.,

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[10]The Court is unpersuaded by Plaintiff's claim that because she was working under an employment contract,her termination is somehow more egregious than the typical employment situation. Additionally, it is indisputable that a mere "breach of contract" does not generally give rise to an intentional infliction of emotional distress claim.

952 F.2d 128 (5th Cir. 1992). The limitations period accrues on the date the employee receives unequivocal notice that she is terminated or when a reasonable person would know of the termination. Id., at 134. In Thurman, the Fifth Circuit stated that "where unequivocal notice of termination and the employee's last day of work coincides then the alleged unlawful act will be deemed to have occurred on that date." Id. at 134 (adopting the test articulated by the Third Circuit in Bonham v. Dresser Indus., 569 F.2d 187, 192 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978) (test is not entirely subjective and limitations period begins when employee knows or a reasonable person should have known that his employer has made a final decision to terminate his employment and the employee renders no further services.)

If the employee files suit before limitations runs, the employee must establish a "causal link" between the discharge and the filing of the worker's compensation claim. Burfield, 51 F.3d at 590. If the employee establishes this "causal link", the employer must rebut the allegations by showing a legitimate reason for the discharge. Investment Properties Management, Inc. v. DeMontes, 821 S.W.2d 691, 694 (Tex. App. -- El Paso 1991, no writ).

In Hughes Tool Co. v. Richards, 624 S.W.2d 598, 599 (Tex. Civ. App. -- Houston [14th] Dist. 1981, n.r.e.), the Houston Court of Appeals held that the Plaintiff had failed to establish a "causal link" between the filing of his worker's compensation claim and his termination. The court then discussed cases in which a "causal connection" had been established.

For instance Murray Corporation of Maryland v. Brooks, 600 S.W.2d 897, 901 (Tex. Civ. App. -- Tyler 1980, no writ), evidence was introduced indicating that the employee was terminated because of the increased insurance premiums

that resulted from the filing of worker's compensation claims. Testimony was given rebutting the employer's stated reasons for the employee's termination, and the only employees not called back to work after an alleged recession were the only two employees who had filed a worker's compensation claim.

In Schrader v. Artco Bell Corp., 579 S.W.2d 534, 539 (Tex. Civ. App. -- Tyler 1979, writ ref'd n.r.e.), testimony was given that the employee's foreman told him that he could not work for the company as long as an attorney represented him. Additionally, the Executive Vice-President told the employee that since the company had a worker's compensation claim with him, he could not put him back to work. Id.

Finally, as an example, the Court of Appeals, in A. J. Foyt Chevrolet, Inc. v. Jacobs, 578 S.W.2d 445, 447 (Tex. Civ. App. 1979, no writ) held that because the parts and service manager told the employee, "I would put you back to work, but I would be a dammed fool to hire you with a lawyer," and the general manager told him that he was discharged because he would not fire his lawyer. The Plaintiffs in these cases sufficiently established causation between the filing of their worker's compensation claim and their termination.

In the present case, Defendants Michaelis, Garrett, Coronado and Jones cannot be "employers". Plaintiff concedes this point. "Plaintiff agrees that her claim for retaliation for filing a worker's compensation claim is a claim solely applicable to the Defendant College, as Plaintiff's employer, and does not impose liability on the individual Defendants for this retaliation against her." Plaintiff's Response to the Motion for Summary Judgment at p. 18.

Defendant MCC states that Plaintiff's claim should be dismissed because she was "terminated" on February 11, 1993. Therefore, her cause of action accrued on this date, and her

claim is, therefore, barred by the statute of limitations. On the other hand, Plaintiff asserts that she was not terminated until March 31, 1993.

MCC maintains that Plaintiff was terminated when she was given a letter on February 11, 1993, stating that she was being placed on administrative leave with pay.

On the other hand, Plaintiff states in her affidavit that in a "meeting [with] Mr. Jesse Alvarez, the new personnel director, and Dr. Garrett [she was advised] that there had been a recommendation to terminate her employment and that [she] would be placed on administrative leave until the end of March, 1993, when [the] employment would be terminated officially." Additionally, the letter informing her of her impending termination states

> [b]ased upon the recommendation of your supervisors, I am approving termination of your employment with McLennan Community College as of March 31, 1993. You will be relieved of your duties as Coordinator of the Upward Bound Program effective immediately and placed on administrative leave with pay.

Finally, when Plaintiff filed for unemployment compensation with the Texas Employment Commission on February 14, 1993, MCC responded to her application for unemployment by stating that Plaintiff had been employed from "9/2/90 through 3/31/93", Plaintiff's Exhibit B, and that she was "considered to be on the payroll" "through 3-31-93". Plaintiff's Exhibit C.

Clearly, the facts regarding when Plaintiff was terminated are in dispute. Both sides present arguments that could persuade a reasonable trier of fact to find in their favor. However, such a factual dispute cannot be resolved in a

motion for summary judgment. Accordingly, the court will assume, arguendo, that Plaintiff was "terminated" on March 31, 1993 and her cause of action accrued on that date.

While the Defendant MCC is not entitled to summary judgment based on the running of the statute of limitations, Plaintiff's inability to establish a "causal connection" between the filing of her worker's compensation claim and her termination is fatal to her claim. In addition to presenting competent summary judgment evidence that Plaintiff was terminated for insubordination and the inability to follow the directives of her superiors, Plaintiff fails to provide any evidence on her § 451.001 claim other than the fact that she was terminated after filing a worker's compensation claim. In fact, Plaintiff's own deposition testimony reveals her inability to establish any "causal" connection. First, Plaintiff is not even sure she filed a worker's compensation claim:

> Q: Ms. Taylor when did you file a worker's compensation claim?
>
> A: When did I file one?
>
> Q: Yes. When did you file it?
>
> A: I don't know that I filed one. I filled out some papers for the institution.

MCC's Motion for Summary Judgment. Plaintiff's Deposition at p. 145. Additionally, Defense counsel asks

> Q: . . .If you had not been asked, or filed a form regarding a work-related injury, do you believe you would still be employed today at MCC?

A: I can't answer that.

Plaintiff's Deposition at p. 154. Further, Plaintiff acknowledges that she was threatened with termination months before she filed an injury form at work.

> Q: ". . .isn't it clear you have been threatened with termination on several occasions more than six months before you ever filed a work-related -- work-related injury form at work?
>
> A: That is correct. un-huh.

Next, in an effort to get Plaintiff to state why she believes she was terminated for filing a worker's compensation claim. Defendant's attorney asks

> Q: Other than the fact that your termination came after you filed that claim for worker's comp, in terms of the timing -- other than one event happening after the other, what evidence do you have that the institution was motivated by your having filed a worker's compensation claim?
>
> A. I can't answer that. I don't know what their motivation was.
>
> Q. You don't know what their motivation was?
>
> A. Well --
>
> Q. that was your answer, correct?

A. I can't -- I can't pin their motivation down. It was a combination of things.

Plaintiff's deposition at p. 154-55.

Finally, Plaintiff's worker's compensation claim arose out of an incident where she and other co-workers inhaled fumes at MCC on January 4, 1993. In addition to Plaintiff, other co-workers reported similar injuries and they filed reports. These individuals were not fired. Plaintiff's Deposition at p. 154-55. In fact, one such individual replaced Plaintiff as the new Upward Bound Coordinator. Thus, based on the foregoing, Plaintiff's §451.001 is dismissed.

In conclusion, Plaintiff's claims pursuant to 42 U.S.C. §1981, 1983 and 1985 are dismissed. Additionally, Plaintiff's sexual and racial discrimination claims pursuant to Title VII are dismissed as are her state based claims of intentional infliction of mental anguish and her worker's compensation retaliation claim. Accordingly, it is

ORDERED that Defendants' McLennan Community College ("MCC"), Dennis Michaelis ("Michaelis"), Deborah Garrett ("Garrett"), Richard Coronado ("Coronado"), and Mike Jones ("Jones"), Motions for Summary Judgment are **GRANTED**. It is further

ORDERED that this case is **DISMISSED**.

SIGNED this 7th day of July, 1996.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50601

D.C. Docket No. W-94-CV-288

ELEANOR TAYLOR
Plaintiff - Appellant

v.

MCLENNAN COMMUNITY COLLEGE,
DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
DR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants - Appellees

Appeals from the United States District Court for the Western District of Texas, Waco

Before BENAVIDES, STEWART, AND DENNIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: August 27, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50601

ELEANOR TAYLOR Plaintiff-Appellant,

versus

MCLENNAN COMMUNITY COLLEGE,
DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
DR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas, Waco
(W-94-CV-288)

Before BENAVIDES, STEWART AND DENNIS, Circuit Judges.

PER CURIAM**********

Plaintiff-Appellant Eleanor Taylor ("Taylor") appeals the district court's grant of Defendants-Appellees' motions for summary judgment and dismissal of Taylor's claims pursuant

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**********Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local rule 47.5.4.

to 42 U.S.C. §§ 1981, 1983, 1985, Title VII, and Texas state claims of intentional infliction of mental anguish and section 451.001 of the Texas Labor Code. After considering the parties' briefs and argument, and after reviewing the record on appeal, we affirm substantially on the basis of the district court's thorough and well-documented findings of fact and conclusions of law.

Specifically, we find that summary judgment is appropriate for the following reasons:

1. Race Discrimination and Retaliation: Taylor fails to demonstrate that Defendants-Appellees' proffered reasons for her termination are pretextual.

2. Sex Discrimination: Taylor fails to establish a *prima facie* case because she was replaced by another female, and she fails to show that Defendants-Appellees' articulated reasons for her termination are pretextual.

3. First Amendment Free Speech: Taylor's complaints were not of "public concern," but were personal in nature and not intended to protect the public interest of discrimination free work places. Moreover, Taylor's speech interest is outweighed by Defendants-Appellees' interest in efficient management. Finally, Taylor fails to establish a causal connection between her termination and her speech.

4. Due Process: Taylor fails to establish a liberty interest because her allegations do not rise to the level of creating a "badge of infamy," which would destroy her ability to obtain other employment. Furthermore, the evidence establishes that Taylor received sufficient notice of the reasons for her termination, and that she did not request a post-termination hearing.

5. Workers' Compensation: Taylor fails to demonstrate a causal link between her filing of a workers' compensation claim for inhalation of toxic fumes and her termination. Several other employees filed claims for the same incident and were not terminated.

6. Intentional Infliction of Emotional Distress: Taylor's allegations are not "extreme and outrageous," for they occurred entirely within a normal employment dispute. Thus, Taylor failed to prove an element of intentional infliction of emotional distress under Texas law.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50601

ELEANOR TAYLOR
Plaintiff - Appellant

v.

MCLENNAN COMMUNITY COLLEGE,
DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
DR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants - Appellees

Appeals from the United States District Court for the
Western District of Texas, Waco

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 6/26/96, 5 Cir., F.3d)
(August 13, 1996)

Before BENAVIDES, STEWART AND DENNIS, Circuit Judges.

PER CURIAM:

(/S/ X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Fortunato P. Benavides
United States Circuit Judge

CLERK'S NOTE
SEE FRAP AND
LOCAL RULES 41
FOR SAY OF THE
MANDATE.